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IN THE

Supreme Court of the United States

October Term, 1973

Nos. 73-152
73-153
73-154

HOWARD PIPER, THOMAS C. PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE, and THE FIRST BOSTON CORPORATION,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Dated: September 18, 1973

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BRIEF FOR THE RESPONDENT IN OPPOSITION

This brief is submitted by respondent Chris-Craft Industries, Inc ("Chris-Craft") in opposition to three petitions for certiorari filed by Howard Piper, Thomas C. Piper, William T. Piper, Jr.; Bangor Punta Corporation ("Bangor Punta"), Nicolas M. Salgo, David W. Wallace; and by the First Boston Corporation ("First Boston").

Questions Presented

The Court of Appeals for the Second Circuit held that petitioners violated the anti-fraud and anti-manipulation provisions of the Securities Exchange Act of 1934, and the registration provisions of the Securities Act of 1933 in a contest with Chris-Craft for control of Piper. Petitioners do not seek review of that holding. The contest ended with Chris-Craft owning 43% of Piper's stock and Bangor Punta owning 51%, of which 14½% was acquired in transactions which the Court held violated the securities laws. The Court of Appeals remanded the case to the District Court for a determination of the damages to be awarded Chris-Craft and issuance of an injunction barring Bangor Punta from voting its illegally acquired stock.

In these circumstances, the questions presented by the petitions are:

1. Should this Court grant a writ of certiorari to review the holding below that a contestant for control has the same standing as corporate insiders to recover damages for violations of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(e), when that holding is in accord with the legislative history and all the authorities?

2. Should this Court grant a writ of certiorari to review the claim that the United States Court of Appeals for the Second Circuit substituted a negligence standard for *scienter* in actions for damages under the securities laws, when the Second Circuit expressly and unanimously reaffirmed its *scienter* requirement and the undisputed facts satisfy that standard as well as the standards prevailing in every circuit?

3. Should this Court repudiate the standards of causation of *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), followed by the Court below, where the illegally acquired blocks were decisive in giving Bangor Punta control?

4. Assuming, *arguendo*, that there were legitimate issues worthy of Supreme Court review, should this Court consider them before the District Court has, on remand from the Second Circuit, held its inquest on relief, and entered a final judgment, when the case has been in litigation over four years, and when further delay continues the devastating injury to the victim?

Statement

This case arises out of a contest between Bangor Punta and Chris-Craft for control of Piper, a publicly-held corporation listed on the New York Stock Exchange at the start of the contest. Chris-Craft invested over $44 million in Piper, of which more than $38 million was in cash, and ended up with approximately 43% of Piper's stock (487A-489A).[1] Bangor Punta, Chris-Craft's rival and the ally of the Piper insiders, paid less than $16 million in cash plus packages of its own stock, warrants and debentures to acquire 51% of Piper's stock (485A), including 14½% acquired in transactions which petitioners no longer contest violated the securities laws.

1. References preceded by "Jt. App." are to the opinions reproduced in the Joint Appendices filed separately by petitioners. References followed by "A" are to pages of the Appendix filed in the Court of Appeals.

Since the facts in this case were well-summarized in the Court of Appeals' opinions, we shall review only the highlights.

Piper's Scorched Earth Policy

Chris-Craft is a public company whose stock is traded on the New York Stock Exchange (Jt. App. H-8). On January 23, 1969, Chris-Craft announced a cash tender offer for 300,000 or more shares of Piper at $65 per share (Jt. App. H-10). Although this was $12 above the then market price, Piper's management (essentially composed of members of the Piper family) immediately embarked on what its President called a "scorched earch" policy to defeat Chris-Craft (1890A).

Thus, on January 27,[2] the Piper management wrote to Piper shareholders, over the signature of petitioner W. T. Piper, Jr., that the $65 Chris-Craft cash tender offer was "inadequate." The Piper petitioners chose not to disclose in this letter that:

(1) Petitioner First Boston had just advised Piper that $65 was indeed a fair and equitable price for an individual shareholder to receive (2079A-2081A); and

(2) that Piper's insiders and First Boston were offering Grumman Aircraft Corp. ("Grumman") the right to purchase from Piper's treasury the same number of Piper shares at the identical $65 price.

The Second Circuit unanimously held that those nondisclosures violated Section 14(e), which applies the standards and language of Rule 10b-5 to tender offers (Jt. App. H-38, H-112).

2. All dates are in 1969 unless otherwise indicated.

Next, Piper's insiders issued a press release dated January 29, which stated that Grumman had "agreed" to purchase 300,000 shares of Piper at $65 a share. The release was a fraud. It failed to disclose that Grumman had an absolute right to "put" the 300,000 shares back to Piper at the same $65, plus interest, for a period of seven months, during which time Grumman could consider the desirability of a merger, a matter about which it had misgivings. In short, contrary to the Piper press release, Grumman had not agreed to invest $20,000,000 but merely had an option to do so, which it chose not to exercise. W. T. Piper, Jr. admitted at trial that the purpose of the Grumman transaction was to make the Chris-Craft tender offer "less attractive to our shareholders" (2114A-2115A; Jt. App. H-11 to H-12). The Second Circuit recognized that the press release, issued at a critical time, "adversely affected" Chris-Craft's tender offer (Jt. App. A-3, B-3 to B-4), and violated Section 14(e) (Jt. App. H-39). Although Chris-Craft's offer was $12 above market, it was able to acquire only slightly more than 300,000 of the more than 800,000 Piper shares in the public's hands. These shares together with prior purchases by Chris-Craft, gave it 33% of Piper's stock (Jt. App. H-17).

Piper then attempted to dilute Chris-Craft's equity in Piper by issuing 470,000 shares of Piper stock (almost 29% of its total stock) to acquire U.S. Concrete Company of Florida and Southply, Inc. Under the rules of the New York Stock Exchange ("NYSE"), the issuance of such a substantial block of shares required stockholder approval. Since Piper sought no such approval, Piper's registrar refused to issue the shares (278A-279A, 2093A). In what the Second Circuit called "an extremely unconventional pro-

cedure" (Jt. App. II-13), Piper defied the NYSE rules, and bypassed its transfer agent by issuing stock certificates itself (2093A). Piper's extraordinary action led the NYSE to suspend trading in Piper and initiate delisting procedures (305A). Only then did Piper rescind the illegal issuance of stock (307A). In the meantime, Chris-Craft commenced preparation of an exchange offer to Piper shareholders to obtain majority control.

Bangor Punta Enters the Plot

The culmination of the Piper family resistance to Chris-Craft was the alliance with Bangor Punta. Negotiations with Bangor Punta began as early as January 24, the day after the announcement of Chris-Craft's cash offer. The talks broke off, began again and climaxed with a formal agreement on May 8 between Bangor Punta and the Piper family. The family sold its entire Piper holdings (approximately 30%) to Bangor Punta in exchange for a package of Bangor Punta securities. Bangor Punta simultaneously agreed to offer to Piper shareholders what Bangor Punta's and Piper's joint May 8 press release called "a package of Bangor Punta securities to be valued in the judgment of the First Boston Corporation at not less than $80 per Piper share."[3] As the Second Circuit held, in its April 28, 1970 *en banc* opinion, the May 8, 1969 announcement violated SEC Rule 135 and Section 5 of the Securities Act of 1933, 15 U.S.C. §77(e) (the "gun-jumping" rules),[4]

3. Chris-Craft announced its own exchange offer for Piper on May 7 (Jt. App. II-17 to II-18). In accordance with SEC rules, it stated no value for the package.

4. In this decision, more than three years ago, the Second Circuit also held that Bangor Punta had violated Rule 10b-6 under the 1934 Act by acquiring Piper shares for cash at a time when there

because it placed a specific dollar value on the unspecified package of Bangor Punta securities (Jt. App. B-9 to B-15). On May 26, the SEC brought an action against Piper and Bangor Punta for this violation. Both defendants consented to an injunction (J. App. H-15).

To insure the success of its proposed exchange offer to the public, Bangor Punta made a side deal with the Piper family. The May 8 agreement between the two provided that if Bangor Punta obtained more than 50% of Piper's stock, the consideration to be paid to the Piper family would be increased by the difference between the value of the existing package of securities given the family and $80 a share. By July 18, the effective date of Bangor Punta's public offer, the Piper family stood to reap a windfall of more than $13,000,000 if they persuaded Piper shareholders to tender a majority of Piper's securities to Bangor Punta (EV 259-60).[5] Indeed, Bangor Punta admitted that it devised this "bonus" arrangement to assure the active cooperation of the Piper insiders (2155A-2156A). It did so.

In letters and press releases issued between May 8 and July 18, the Piper insiders strongly and repeatedly urged Piper shareholders to accept Bangor Punta's exchange offer instead of Chris-Craft's. Not a single one of these communications to Piper shareholders disclosed that the Pipers would receive up to $13,000,000 if the shareholders followed

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were competing exchange offers pending. The Court of Appeals remanded to determine the appropriate remedy. On remand, the District Court ruled no relief was called for. The Second Circuit reversed and it is that ruling which petitioners now request this Court to consider.

5. Citations preceded by "EV" are to the Exhibit Volumes filed in the Court of Appeals.

their advice, which purported to be impartial. The Second Circuit ruled that by endorsing the Bangor Punta offer while remaining silent about their possible $13,000,000 bonus, the Piper insiders again violated Section 14(e) (Jt. App. H-40 to H-41).[6]

Bangor Punta's Illegal Cash Purchases of Key Blocks

Under Rule 10b-6, 17 CFR §240.10b-6, neither Chris-Craft nor Bangor Punta was free to make cash purchases of Piper stock until their exchange offers were concluded (Jt. App. B-15 to B-18). Both sides recognized that certain key blocks of Piper stock held by large investors could well be determinative of the control contest. As early as April 20, 1969, at a meeting attended by Bangor Punta, First Boston and the Piper insiders, First Boston noted that if these blocks could be taken "from under" Chris-Craft, petitioners' chances of victory were good (382A-382A-1). Bangor Punta recognized in an internal memorandum that its success in the control contest depended on its ability to acquire these shares (EV 298). Indeed, the early drafts of the agreement between Bangor Punta and the Piper family explicitly obligated Bangor Punta to solicit these blocks (383A-384A; EV 174-257).

All parties were on express notice of Rule 10b-6's prohibition against cash purchases of these blocks. On May 5, 1969, the SEC had specifically warned of the prohibition in a release (No. 34-8595), which all of the petitioners admittedly received (378A-381A).

6. The Court of Appeals, however, concluded that because Chris-Craft uncovered the side deal and reported it in its own communications to Piper shareholders, this violation by the Piper insiders did not cause damage to Chris-Craft.

The outcome of the control contest was largely determined by the parties' attitude toward compliance with Rule 10b-6. Chris-Craft complied with the Rule, and refrained from purchasing for cash the critical blocks that Bangor Punta's president recognized were "emotionally committed" to Chris-Craft (1836A). Bangor Punta, despite its general counsel's advice that it should comply with the Rule (1644A, 1645A, 1695A), proceeded immediately to violate it by purchasing for cash three blocks totalling 7½% of Piper's stock. So vital were those blocks to Bangor Punta's bid for control that Bangor Punta's general counsel, forsaking his own advice, flew to Nassau to close one of the purchases (from Bernard Cornfeld's Fund of Funds) (390A-392A). The Second Circuit unanimously held, in its 1970 *en banc* opinion and in the present opinion in 1973, that the acquisition of the 7½% of Piper's stock for cash violated Rule 10b-6 and was decisive in Bangor Punta's gaining control (Jt. App. B-15 to B-18, H-67, H-96, H-111). Indeed, upon completing the purchases, Bangor Punta was able to state in a complaint against Chris-Craft filed in the District Court that Chris-Craft's bid for control of Piper was no longer viable.

The Exchange Offer

Having blocked Chris-Craft by cash purchases of the swing blocks in violation of Rule 10b-6, Bangor Punta then proceeded to cement its control by making an exchange offer in July of 1969 to Piper's shareholders in competition with an outstanding exchange offer by Chris-Craft. First Boston acted as Bangor Punta's underwriter, and endorsed and distributed its prospectus to Piper shareholders. Both the Second Circuit and the District Court found that the pro-

spectus for Bangor Punta's exchange offer was materially misleading. Petitioners do not now seriously dispute that the prospectus, and the registration statement of which it was a part, violated the anti-fraud provisions of the 1934 Act.

The prospectus contained a crucial misrepresentation of the value of Bangor Punta's subsidiary, the Bangor & Aroostock Railroad ("BAR"). The prospectus stated that the railroad was carried at a value of $18.4 million based on an appraisal of the railroad's fair market value (Jt. App. C-3 to C-5). In fact, in May of 1969, a special committee of Bangor Punta's Board, composed of those directors most knowledgeable and experienced in railroad matters and charged with proposing a disposition of the railroad, had recommended selling the railroad for $5 million, the offer made by the only feasible purchaser; and Bangor Punta's Board had unanimously agreed to make a counter-offer to this purchaser of $7 million (516A-518A, Jt. App. H-44). Shortly after the exchange offer closed, Bangor Punta sold the railroad to the same purchaser for $5 million (Jt. App. C-5 to C-7).

The District Court found that Bangor Punta "could not, at the time [of the prospectus] have believed that the $18.4 million figure (based on an appraisal of 1965 fair market value) any longer represented a responsible appraisal of market value of the BAR holding" (Jt. App. C-13). The Second Circuit added that the failure to disclose the negotiations to sell the railroad for a loss of between $11 and $13 million "clearly was unreasonable" and that the Bangor Punta petitioners "showed reckless disregard for the import of their activities concerning the BAR" (Jt. App.

H-48). No petitioner seeks to defend the prospectus in this Court.

First Boston admittedly had read in Bangor Punta's minutes that the Board was prepared to sell the railroad for $7 million, and that the Board's railroad committee had recommended acceptance of the $5 million offer (556A). Despite this, First Boston, which served on Piper's strategy team to defeat Chris-Craft's bid (Jt. App. H-10), placed its name on the Bangor Punta prospectus with the overstated railroad value, and distributed the prospectus to the Piper shareholders who had to choose between Bangor Punta's and Chris-Craft's offers.

The inflation of the fair market value of the railroad in Bangor Punta's prospectus could not have been more material in the competition with Chris-Craft for Piper shares. Bangor Punta reported its income in the prospectus at $3.04 a share. Had it reflected the BAR at its actual value, Bangor Punta would have shown a net loss of $1.25 a share. This loss would have eliminated 36% of Bangor Punta's retained earnings and 12% of its shareholders' equity (Jt. App. H-26).

Bangor Punta's fraudulent prospectus brought it another 7% of Piper's stock on the exchange offer, thus raising its total to 45%. This gave it an unbeatable advantage over Chris-Craft, which then had 41% of Piper's stock. With only 14% of Piper's stock remaining in public hands, Bangor Punta could acquire majority control by purchasing only one share for every two that Chris-Craft would have to buy—and thus it could pay double the price per share that Chris-Craft could. The scorched earth policy had worked. The control contest was thus over, and Bangor Punta pro-

ceeded to buy the relatively few additional shares it needed to raise its holdings to over 50%—the percentage needed to compel a merger.

A Summary of the Violations

In sum, petitioners' conduct in resisting Chris-Craft's bid for control of Piper, and seeking control for Bangor Punta was marked by defiance of the securities laws from beginning to end. The following violations of the anti-fraud and anti-manipulation provisions were found below, and the fact of these violations is not contested in this Court:

1. Piper's January 27 letter describing the Chris-Craft cash tender offer as "inadequate."

2. Piper's January 29 press release claiming that Grumman had committed itself to invest in Piper, when in effect Grumman had merely been granted an option.

3. The May 8 joint press release by Piper and Bangor Punta, which violated the SEC's gun-jumping rules.

4. The purchase by Bangor Punta in May of 7½% of Piper's stock for cash in knowing violation of Rule 10b-6.

5. The June 4, June 20 and July 25 letters from the Piper insiders urging rejection of Chris-Craft's exchange offer and acceptance of Bangor Punta's without disclosing that they stood to obtain a $13 million personal bonus if Bangor Punta acquired over 50% of Piper's stock.

6. The July 19 Bangor Punta prospectus, endorsed by First Boston as underwriter, carrying the railroad at a value overstated by more than $13 million.

The Status of Litigation

Chris-Craft commenced this action for damages and equitable relief on May 22, 1969.[7] On July 22, 1969, with the control battle still in progress, Chris-Craft moved for a preliminary injunction restraining Bangor Punta from voting or retaining certain blocks of its Piper stock acquired in violation of Rules 10b-6, 135 and 10b-5. The District Court denied the preliminary injunction (Jt. App. A). The Court of Appeals, sitting *en banc*, affirmed the denial of preliminary relief, on the ground that Chris-Craft was not threatened with irreparable injury. However, the Court of Appeals disagreed with the District Court's analysis on the merits and held that Bangor Punta's block purchases violated Rule 10b-6 and that the May 8 press release by Piper and Bangor Punta violated the "gun-jumping" rules of the 1933 Act. The SEC submitted an amicus brief in support of these views. The case was remanded to determine the appropriate relief to Chris-Craft (Jt. App. B).

The decision on remand was not rendered until December 10, 1971 (Jt. App. G). In an opinion, which antedated this Court's decision on causation in *Affiliated Ute Citizens v. United States, supra*, the District Court ruled that, although defendants had indeed violated the securities laws, Chris-Craft could not, in the District Court's view, meet the necessary standard of causation by proving with certainty that it would have won this close race in a fair contest not marred by petitioners' illegal activities. The District Court also reasoned that sophisticated investors

7. An amended complaint seeking divestiture of Bangor Punta's illegally acquired stock was filed on May 9, 1969, and on June 9, 1970 Chris-Craft again amended its complaint to reflect additional and subsequent facts as defendant's deceptive and manipulative practices continued. Chris-Craft continued to seek damages, divestiture and injunctive relief.

are entitled to little, if any, protections under the securities laws in corporate control contests.[8]

Chris-Craft appealed, the SEC again filed an amicus brief in support of Chris-Craft, and the Second Circuit reversed. In a decision dated March 16, 1973, the Court held that petitioners had violated the securities laws in their press releases, cash acquisitions and prospectus. In light of the fact that Bangor Punta's control of Piper rested on its illegally acquired shares, the Court held that not only under the principles of *Mills* and *Ute* but as a matter of simple mathematics, the petitioners' violations were the cause of Chris-Craft's damages. The Court of Appeals remanded for an injunction against Bangor Punta's voting the unlawfully acquired shares for at least five years and for a determination by the District Court of the amount of damages due Chris-Craft (Jt. App. H).

Petitioners once again applied for rehearing and rehearing *en banc*. The *en banc* petition was denied on April 25, 1973 (Jt. App. J) but the Court did grant part of First Boston's request for rehearing and held that the District Court, on remand, was to determine whether two officers of First Boston, who were also defendants in this case, should be held individually liable (Jt. App. I).[9]

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8. At the same time, the District Court dismissed a counteraction by Bangor Punta and a counterclaim by Piper alleging Chris-Craft concealed its plan to acquire control of Piper. The Court found these charges unsustained by credible evidence (Jt. App. F-13). Piper did not appeal the dismissal of its counterclaim. The dismissal of Bangor Punta's action against Chris-Craft was affirmed (Jt. App. H-76) and Bangor Punta does not seek certiorari on that ground.

9. In addition to the action by Chris-Craft, the flagrant conduct of the petitioners resulted in actions by both the New York Stock Exchange and the SEC. As noted above, the Stock Exchange commenced proceedings against Piper for issuing treasury shares with-

Summary of Argument

This is not an appropriate case for certiorari. It raises no novel or unsettled questions and presents no conflict among the circuits. It is a "garden variety" case of stock fraud in which petitioners admittedly and repeatedly violated the anti-fraud and anti-manipulation provisions of the securities laws. The questions tendered by the petitions have been manufactured by taking liberties with the voluminous record below and by misrepresenting the numerous and carefully considered opinions[10] by the Court of Appeals for the Second Circuit, which has twice condemned petitioners' conduct. The only thing unusual about the case is the extent and seriousness of the violations.

Bangor Punta concededly acquired 7½% of its stock by cash purchases in deliberate violation of Rule 10b-6, an anti-manipulation provision under the 1934 Act. It acquired another 7% block on an exchange offer by a prospectus, endorsed by First Boston, that was admittedly misleading. Without *either* one of the 7% blocks, Bangor

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out stockholder approval in an effort to dilute Chris-Craft's position. The SEC in May of 1969 commenced an action against Bangor Punta and Piper for issuing the May 8 release in violation of the gun-jumping rules. Both parties consented to an injunction. The ink was scarcely dry on the injunction when Bangor Punta issued the false prospectus, and the SEC commenced a new action, which was tried jointly with the Chris-Craft action. While the District Court found that Bangor Punta violated the law, and ordered that an offer of rescission be made to Piper shareholders, it denied the SEC's application for an injunction. This denial was affirmed by a divided Court of Appeals, and the SEC is presently seeking certiorari.

10. The prior decisions in this action contained in petitioners' Joint Appendix total almost 250 pages. They represent the views of 13 district and appellate judges, not counting those members of the Second Circuit who refused to hear this case *en banc* a second time.

Punta would have failed to achieve control; without both, the score would have been 31% to 41% in favor of Chris-Craft after the exchange offers ended (478A).

In addition, the Piper insiders further frustrated Chris-Craft's opportunity for a fair contest for control by issuing a series of press releases which were false and misleading. It is also undisputed that First Boston, the chief advisor of petitioners, aided and abetted Bangor Punta's illegal takeover by adding its prestigious name to the prospectus despite its admitted knowledge of the facts that established the BAR was grossly overvalued.

Without contesting the fact of their violations, petitioners resort to technical arguments and imaginary claims that the opinion below somehow represents an extension of the securities laws on the issues of standing, *scienter* and causation. They claim that Chris-Craft lacks standing to sue for damages under Section 14(e)—although it was the admitted target and victim of petitioners' conceded violations of law. They also claim that there was no causal connection between their violations and Chris-Craft's injury—although Bangor Punta admittedly acquired the two 7% swing blocks, necessary for control, by violating the securities laws. Petitioners also claim that they did not have the requisite *scienter* for liability under Section 14(e)—although the record shows that they acted with actual knowledge of their false statements and illegal purchases.

Petitioners fail to raise any questions concerning Bangor Punta's liability to Chris-Craft under Rule 10b-6 even

though the acquisition of 7½% of Piper's stock in violation of that Rule was alone dispositive of the control contest. As we shall demonstrate, the issues which petitioners ask this Court to consider concerning their liability under Section 14(e) were all resolved by the Second Circuit in accordance with established principles enunciated by this Court, and raise no questions meriting further review:

Standing. Petitioners contend that the Circuit Court erred in recognizing Chris-Craft's standing to recover damages for the injuries inflicted upon it by petitioners' violations of the securities laws. Petitioners concede that Chris-Craft had standing to sue for injunctive relief. They also concede that a target company, such as Piper, would have standing to recover damages from a tenderor under Section 14(e). But they argue that a tenderor should be limited to injunctive relief and not afforded standing to claim damages even where the wrong has been consummated to the point that injunctive relief is no longer feasible. This position, tailor-made to exempt petitioners from all accountability to Chris-Craft for conceded violations of the securities laws, is contrary to the language and history of Section 14(e), to every decision and commentary on the subject, and to the principles and policy enunciated by this Court in a long line of cases including *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971), and other decisions. Standing is simply not at issue in this case.

Scienter. Petitioners also assert that the Second Circuit eliminated its own requirement of *scienter* as an element of recovery for securities violations. But each mem-

ber of the Court of Appeals panel specifically reaffirmed that *scienter* was required, and each member pointed out that petitioners' conduct met the strictest *scienter* requirements. The record amply supports this conclusion. Parties who disseminate false information in a close control contest to carry out a "scorched earth" policy against their rival, and who acquire shares in knowing violation of the securities laws and against the advice of their own counsel meet the test of *scienter*, no matter how it is formulated. Petitioners also claim that there are differences between the circuits as to *scienter* because at least one circuit does not require *scienter*. But the Second Circuit does require *scienter* and has a stringent standard. Thus, this case, in which petitioners' conduct would subject them to liability in any circuit, is not an appropriate case for certiorari.

Causation. Petitioners do not dispute that Bangor Punta acquired 14½% of Piper's stock in violation of the securities laws, and that without this stock Bangor Punta would not have control of Piper. Nonetheless, petitioners still argue that causation was unproven and that in order to recover Chris-Craft had to demonstrate not only that Bangor Punta had acquired control illegally, but that in a hypothetical control contest in which petitioners had not violated the law, Chris-Craft would have prevailed. This Court specifically rejected such arguments in *Mills* and *Ute* and in early cases reaching back to *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). Chris-Craft was entitled to a fair opportunity to compete for control. It lost by a narrow margin caused by Bangor Punta's illegal acquisition of stock. There is no genuine issue of causation here.

Scope of Review. Bangor Punta and First Boston also argue that the Court of Appeals violated the "clearly erroneous" rule on review under Fed. R. Civ. P. 52(a) by substituting its own findings of fact for those of the District Court. There is no basis for this contention. The Court of Appeals explicitly accepted the lower court's findings of fact and disagreed only wtih the legal theories applied by the District Court. Petitioners' arguments as to the scope of review are frivolous and not worthy of certiorari.

Petitioners' application below for *en banc* consideration on grounds similar to those raised here was unanimously denied by the Court. Petitioners are simply seeking to delay a final judgment by applying for certiorari rather than returning to the District Court for a determination of relief.[11] Further delay in the disposition of this case will compound the injury to Chris-Craft. Petitioners have fully litigated this case for more than four years, while Bangor Punta has enjoyed, at Chris-Craft's expense, the fruits of its illegal control over Piper. The fact that this case must, in any event, be returned to the District Court for a determination as to relief is itself sufficient ground for denial of certiorari.

In sum, no interest would be served by granting certiorari. The petitions run against the fundamental policy considerations underlying the securities laws and the main-

11. Significantly, none of the petitioners appears to challenge the Circuit Court's direction that the District Court enter an injunction barring Bangor Punta from voting the illegally acquired shares for a period of at least five years. But the injunction has not yet been entered in view of petitioners' applications for rehearing in the Court of Appeals and for certiorari in this Court.

stream of the law established by this Court and the lower courts both before and after the decision below. As this Court has recognized in an unbroken line of decisions, including, *Borak, S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), *Bankers Life, Mills* and *Ute*, effective enforcement of the securities laws requires that relief be offered to parties injured by securities violations. In few areas has this Court been nearly as unanimous as in its affirmation of the right of recovery for securities fraud.

Petitions for certiorari seeking to create artificial barriers to suit have been consistently rejected (*e.g., S.E.C.* v. *Texas Gulf Surphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3rd Cir.), *cert. denied*, 409 U.S. 874 (1972)). Petitioners' arguments reflect the type of hostile theories toward private actions which have been repeatedly rejected by this Court over the last 20 years.

ARGUMENT

POINT I

THE VIOLATIONS OF RULE 10b-6 DEMONSTRATE THAT CERTIORARI IS UNWARRANTED.

Petitioners have long abandoned any serious contention that Bangor Punta did not violate Rule 10b-6 by acquiring 7½% of Piper's stock for cash while its exchange offer was outstanding. The petitions for certiorari are addressed almost entirely to the petitioners' violations of Section 14(e). Although the violations of Rule 10b-6 were, standing alone, virtually dispositive of the control contest,

petitioners, in effect, concede that there are no issues for certiorari with respect to Rule 10b-6. Thus:

1. Bangor Punta admittedly violated 10b-6 by cash purchases of 7½% of Piper's stock in May. The fact of that violation is not in dispute or questioned by the present petitions.[12]

2. While petitioners challenge Chris-Craft's standing to sue for violations of Section 14(e), it is now also admitted that, as the District Court and Court of Appeals both found, Chris-Craft has *standing* to sue for this violation of 10b-6 (First Boston Pet. at 13).

3. It is also admitted that *scienter* or intent is not required for a 10b-6 violation (Bangor Punta Pet. at 11, n.*). And if it were, Bangor Punta acted with *scienter*—namely, in knowing defiance of the SEC's warning and the advise of its own counsel.

4. Nor can there be a serious question of *causation* as to 10b-6. Chris-Craft refrained from buying the 7½% blocks in compliance with the SEC's directive, even though they were "emotionally committed" to Chris-Craft (1826A, 1836A). Bangor Punta bought the blocks in disregard of that directive and the blocks thus acquired spelled the difference in the race for control.

In sum, all the elements for recovery under Rule 10b-6 are established—a violation, standing, intent and causation.

12. Bangor Punta did not contest its violations of Rule 10b-6 below (Jt. App. H-65). It now seeks to suggest its innocence by a half-hearted remark in a footnote (Bangor Punta Pet. at 18, n.*).

Since that violation, standing alone, was sufficient to determine the outcome of the control contest, there is little purpose in granting certiorari to consider the Section 14(e) issues relating to the press releases and misleading registration statement by which Bangor Punta acquired an additional block of 7%. Burdened with an over-crowded docket and hundreds of other petitions for certiorari, the Court should not grant the present petitions which focus primarily on Section 14(e) questions, since the 10b-6 violation is admitted on all counts and justifies the relief awarded against Bangor Punta.

POINT II

IN HOLDING PETITIONERS LIABLE FOR THEIR ADMITTED VIOLATIONS OF SECTION 14(e), THE SECOND CIRCUIT APPLIED PROPER AND TRADITIONAL PRINCIPLES OF STANDING, *SCIENTER* AND CAUSATION; THERE ARE NO NEW POINTS REQUIRING REVIEW.

Petitioners claim that certiorari should be granted because Section 14(e) is a recent statute, and should be construed by this Court. There is no need for such construction. Section 14(e) was adopted to apply the same code of conduct to tender offerors that Section 14 provided for proxy contestants (p. 25, *infra*). Section 14 has been construed by this Court in *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964) and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), on the very issues which petitioners seek to imply are still open. Moreover, Section 14(e) embodies the same principles, and indeed the same language as Rule 10b-5, which is the subject of a huge body of case law. *Electronic*

Specialty Co. v. *International Controls Corp.*, 409 F.2d 937, 940-41 (2d Cir. 1969) (Jt. App. II-31 to II-34, II-103, II-105).

All of the issues under Section 14(e) which petitioners seek to raise—standing, *scienter* and causation—have been passed on by this Court and by other courts both before and after the opinion below. That opinion is correct.

Standing

Petitioners assert that this Court should grant a writ of certiorari to determine whether Chris-Craft has standing to sue for damages under Section 14(e). Petitioners concede that Chris-Craft has standing to sue under Section 14(e) for injunctive relief (Piper Pet. at 15; First Boston Pet. at 31). Disregarding the fact that when Chris-Craft sought a preliminary injunction, petitioners successfully opposed it (Jt. App. B-8 to B-9), petitioners now argue that since their admitted violations here made injunctive relief alone no longer fully adequate, the victim should be denied meaningful damage relief.

Petitioners also concede that a target company, such as Piper, and its management have standing under Section 14(e) to sue a tenderor for damages (Bangor Punta Pet. at 24-26; First Boston Pet. at 28-32). But they claim that Section 14(e) is a one-way street insofar as damages are concerned. If violations of Section 14(e) by the target company and its allies injure a tenderor like Chris-Craft, petitioners say standing to recover damages should be denied.

Petitioners' artificial distinctions between (1) standing for damages versus injunctive relief and (2) standing of the target company versus the tenderor are absurd on

their face, and contrary to the policy and language of the statute. Significantly, petitioners cite no authority which accepts their tortured construction of Section 14(e). All the authority is to the contrary. Here all members of the Court of Appeals panel were unanimous in holding that Chris-Craft has standing,[13] and rehearing *en banc* was denied on this issue. Nor is there any conflict between the circuits. The First Circuit has recently unanimously endorsed the result reached in the present case by holding that an unsuccessful tenderor like Chris-Craft has standing to sue for damages under Section 14(e). *H.K. Porter Co.* v. *Nicholson File Co.*, CCH Fed. Sec. L. Rep. ¶94,083 (1st Cir. July 30, 1973). See also, *Dyer* v. *Eastern Trust and Banking Co.*, 336 F. Supp. 890 (D. Me. 1971) (Shareholder of a tender offeror has standing to sue for damages under Section 14(e).)

The rule that a tender offeror has standing to sue under Section 14(e) is not new law. In *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), the court pointed out that the passage of Section 14(e) "should serve to resolve any doubts about standing in tender offer cases, even where an offeror is not * * * in the position of a forced seller." 419 F.2d at 798-99. And in *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970), on which petitioners relied below, the court denied a tender offeror standing to sue under Section 10b-5 precisely because Section 14(e) was passed to give it a right to sue for damages. 417 F.2d at 969-70. See also, *Electronic Specialty Co.* v. *International Controls*

13. The District Court did not reach the issue of standing under Section 14(e) (Jt. App. G-10).

Corp., supra, 409 F.2d at 940 (Section 14(e) "applies Rule 10b-5 both to the offeror and to the opposition * * *.").

These decisions are in conformity with this Court's decision in *Borak*. Section 14(e) was passed to bring tender offers under the same scheme of regulation that governs proxy contests.[14] In implying a cause of action under Section 14(a) of the 1934 Act in *Borak*, this Court held that, in a proxy contest, those opposing management, as well as management, may sue for damages, to encourage private enforcement of the securities laws. 377 U.S. at 432. Citing the reasoning of *Borak*, the Court of Appeals in the instant case stressed the importance of this enforcement function in permitting Chris-Craft to sue (Jt. App. II-31, II-103). An action by a tender offeror protects the target company shareholders by insuring that the material they receive will be accurate, and, as Judge Timbers pointed out, it also protects the integrity of the securities market itself (Jt. App. II-23).[15] There is clearly no basis for the claim that a contestant for control has less standing to sue for damages under Section 14(e), if it proceeds by tender offer, than it would have under Section 14 if it proceeded by means of a proxy fight.

The SEC appeared below as amicus curiae to urge that Chris-Craft's standing to sue be recognized. And the commentators are in agreement that a tenderor, such as Chris-Craft, has standing to sue for damages under Section 14(e).

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14. *Electronic Specialty Co.* v. *International Controls Corp., supra,* 409 F.2d at 945; *Dyer* v. *Eastern Trust and Banking Co., supra,* 336 F. Supp. at 907.

15. In *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971), this Court also emphasized that protection of the integrity of the securities markets was a purpose of Rule 10b-5, and that Section 10(b) had to be read flexibly to permit those injured by violations of the securities laws to recover their damages.

1 A. Bromberg, *Securities Laws: Fraud* §6.3 (1971); Jacqua, *Defenses Against Uninvited Tender and Exchange Offers*, 59 Ill. B. J. 106, 117 (1970); Mundheim, *Tender Offers*, 2 Rev. of Securities Regulation 953, 956 (1969); Flanagan & Robinson, *Opposition to Tender Offers*, 2 Rev. of Securities Regulation 941 (1969).

The conclusion reached by all courts and commentators that a tenderor has standing under Section 14(e) to sue for damages is based upon and in accord with the legislative history of the Act. With knowledge that this Court in *Borak* had held that Section 14 afforded a private cause of action to both insurgents and management in proxy fights, Congress adopted Section 14(e) to apply the same standards of ethical conduct to exchange and tender offers. Contrary to petitioners' arguments, Congress intended the law to apply equally to all contestants in control contests. The House Report states:

> "The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the take-over bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." H.R. Rep. No. 1711, 90th Cong. 2d Sess. (1968), 2 *U.S. Code Cong. & Admin. News* 2813 (1968).[16]

16. In specific comment on Section 14(e), the House Report states:

> "Proposed subsection (e) would prohibit any misstatement or omission of a material fact, or any fraudulent or manipulative acts or practices, in connection with any tender offer, whether for cash, securities or other consideration, or in connection with any solicitation of security holders in opposition to or in favor of any tender offer. This provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal." *Id.* at 2821.

Citing neither logic nor public policy to defend their position, petitioners seek merely to create a loophole to protect them from accountability to Chris-Craft for their admitted violations. Such an exception cannot be justified by Bangor Punta's threatened horror of a flood of new lawsuits. Bangor Punta assumes that other parties to control contests will act with the same disregard of the laws as it did.[17] If they do, they too should be liable for damages. In any event, petitioners concede that the target company may sue for damages, and that the tenderor has standing to claim injunctive relief. So the issue as petitioners themselves frame it is not whether lawsuits can be brought, but only whether such lawsuits will be able to provide effective relief.

This issue was disposed of in *Mills*, an action under Section 14 for proxy violations. There, this Court held that if the equitable relief of divestiture was not feasible, the District Court should look to damages. 396 U.S. at 388-89. The Circuit Court in this case followed that principle. Noting that divestiture was no longer feasible, because the character of Piper had changed under petitioners' administration during the very pendency of this litigation, it directed the District Court to award damages and injunctive relief (Jt. App. II-68).

Finally, First Boston (at 32) claims that the recognition of Chris-Craft's standing to sue for damages under Section 14(e) denies it the protection available to it as an under-

17. This assumption is unsound. This is perhaps the first case in which parties to a control contest engaged in such flagrant and continuing violations of the law that not only were they condemned by the courts, but the New York Stock Exchange and the SEC had to intervene, the latter by commencing two separate suits.

writer under the 1933 Act. This argument, like First Boston's attacks on *scienter* (see pp. 32-34, *infra*), proceeds on the fallacious assumption that First Boston was held liable for failure to exercise the reasonable diligence required by underwriters by Section 11 of the 1933 Act. First Boston was held liable, not for failure to investigate under Section 11, but under Section 14(e) for suppression of its actual knowledge about BAR's inflated value.[18] There is simply no genuine issue of standing in this case.

Scienter

Petitioners' principal argument is (1) that each of the three judges on the Court of Appeals panel eliminated *scienter* as an element for a securities violation or incorrectly diluted that standard; (2) that other judges on the Second Circuit have subsequently indicated disagreement with the *scienter* rationale adopted in this case; and (3) that there is a conflict among circuits at to what is necessary for a showing of *scienter*. Those contentions are without merit.

The court below did not eliminate or dilute the standard of *scienter*. Each of the judges specifically stated that

18. First Boston repeatedly refers to the *Birnbaum* doctrine as to standing under Rule 10b-5 (at 20, 27). *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). Assuming that *Birnbaum* is still good law after this Court's opinion in *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971), Chris-Craft would have standing under the forced-seller exception to the rule. *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied* 400 U.S. 822 (1970). In any event, Chris-Craft here was granted standing under Section 14(e), not 10b-5; and the Second Circuit has repeatedly recognized that Section 14(e) resolves any doubt that may have existed under 10b-5 about the standing of an offeror. See *Crane* and *Iroquois*, *supra*.

scienter was required in a private action for damages for a securities violation.[19] Moreover, each judge specifically stated that "mere negligence" was not enough to establish *scienter*[20] and that the standard of proof was strict. For example, Judge Timbers stated that *scienter* required proof of "a knowledge of falsity or reckless disregard for the truth" (Jt. App. H-22, H-35). Similarly, Judge Mansfield stated:

> "In short, the *scienter* requirement would be met if the corporate officer (1) knew the essential facts and failed to disclose them, or (2) failed or refused, after being put on notice of a possible material failure in disclosure, to apprise himself of the facts under circumstances where he could reasonably have ascertained and disclosed them without any extraordinary effort." (Jt. App. H-106)

Finally, Judge Gurfein adopted Judge Friendly's view in *S.E.C.* v. *Texas Gulf Sulphur Co.*, *supra*, 401 F.2d at 868, that "recklessness that is equivalent to willful fraud" is required (Jt. App. H-96).

Aside from their abstract formulation of the legal requisites for *scienter*, when the judges below actually dealt with the specific facts in this case, they found overwhelming evidence of *scienter*, even under the most stringent standards. That is shown by the following undisputed facts relied on by the Court of Appeals:

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19. See opinion of Judge Timbers (Jt. App. H-22, H-35 to H-41, H-46 to H-55); opinion of Judge Mansfield (Jt. App. H-103 to H-107); opinion of Judge Gurfein (Jt. App. H-96).

20. See opinion of Judge Mansfield (Jt. App. H-103); opinion of Judge Timbers (Jt. App. H-35); opinion of Judge Gurfein (Jt. App. H-96).

1. When Bangor Punta purchased more than 7½% of Piper stock in cash transactions in May, it did so in *knowing* violation of the SEC's May 5 warning against such purchases and in *knowing* defiance of the advice of its own counsel that it proceed cautiously in view of the SEC's warning.

2. When Bangor Punta obtained an additional 7% of Piper stock via its exchange offer in July, it did so by means of a registration statement that attributed a value to BAR which both the District Court and the Court of Appeals agreed that Bangor Punta actually *knew* was vastly overstated.

3. When First Boston added its name to the registration statement, it also *knew* from its reading of Bangor Punta's minutes that the value of BAR was grossly overstated.

4. When the Piper insiders, who preached a "scorched earth" policy against Chris-Craft, issued press releases in January stating that Grumman had agreed to invest $20,000,000 in Piper, they *knew* that Grumman had no more than an option to invest. Similarly, when the Piper insiders issued a press release in January claiming that Chris-Craft's $65 offer was inadequate, they *knew* that First Boston had just advised them that the price was fair and equitable. And when they sent letters urging Piper shareholders to accept Bangor Punta's exchange offer over Chris-Craft's, they *knew* that if their recommendation was accepted, they would be entitled to a $13 million personal bonus from Bangor Punta.

In summary, the facts here show that defendant acted, not only in reckless disregard of the truth, but with *actual*

knowledge of the falsity and illegality of their conduct. It is difficult to conceive of a case involving a stronger showing of *scienter*—no matter how that standard is defined.

Ignoring the record in this case, petitioners claim that certiorari is appropriate because there is a conflict among the circuits on the issue of *scienter*. In this respect, Bangor Punta, for example, alleges that the Ninth Circuit does not require any showing of *scienter* and that three other circuits (the Seventh, Eighth and Tenth) are satisfied by a showing of mere negligence (Bangor Punta Pet. at 14).

Petitioners exaggerate the apparent conflict among the circuits. As Bangor Punta admits in discussing Judge Adams' opinion in *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3rd Cir.), *cert. denied*, 409 U.S. 874 (1972), the dispute is a matter of dicta and semantics, not holding:

> "This thorough review of the case law forces concurrence with the learned judge's conclusion 'that *in every case* where liability was found, *conduct tantamount to actual fraud existed*, despite the fact that the reviewing court may have used language broader than necessary.' 458 F.2d 255, 286." (Bangor Punta Pet. at 14) (emphasis added)

Moreover, assuming *arguendo* that other circuits do apply a less stringent standard than the Second Circuit, that hardly warrants granting certiorari in this case. For here, petitioners being liable under the allegedly stricter Second Circuit standards would *a fortiori* be liable under the rules of other circuits. Granting certiorari would not change the results; nor would it provide a fact situation from which there could emanate a clearer guide to lower courts as to what degree of *scienter* is required.

Finally, petitioners claim that other members of the Second Circuit have expressed "apparent displeasure"[22] with the *scienter* standard announced by the three-judge panel in this case. In support of that contention, they cite three subsequent opinions by the Second Circuit: *Cohen* v. *Franchard Corp.*, CCH Fed. Sec. L. Rep. ¶93,937 (2d Cir. April 11, 1973), *petition for cert. filed*, 42 U.S.L.W. 3063 (U.S. July 10, 1973) (No. 73-92); *Lanza* v. *Drexel & Co.*, CCH Fed. Sec. L. Rep. ¶93,959 (2d Cir. April 26, 1973); and *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973). But a reading of those cases shows that they are entirely consistent with the *scienter* standard adopted in the instant case. Indeed, in *Lanza*, the court *en banc* cited the present case to define the "normal" test for *scienter*. ¶93,959 at 93,832 n.98.[23] More importantly, petitioners asked the Second Circuit to reconsider this case *en banc*, relying heavily on the very arguments about *scienter* they make before this Court. Not a single judge on the Court of Appeals voted to grant *en banc* consideration.

First Boston makes a special argument about *scienter* (Pet. at 25-7). It claims that under *Lanza* v. *Drexel*, *supra*, a director who does not participate in negotiations or have knowledge thereof is not under a duty to investigate; that First Boston is akin to such director; and that the opinion below improperly imposed Section 11 due diligence obligations to investigate on First Boston vis-a-vis Chris-

22. Bangor Punta Pet. at 12.

23. While Judge Timbers did dissent in *Lanza*, he made it clear that his dissent was based on his view that it was not necessary to resolve the *scienter*/negligence debate in that case since he believed the defendants had acted with sufficient *scienter*. *Supra*, ¶93,959 at 93,843.

Craft. These arguments are specious. First Boston actually read Bangor Punta's minutes which showed that the fair market value of BAR was between $5 and $7 million —yet, it endorsed the registration statement claiming the BAR was worth $18 million. First Boston thus *knew* of the gross disparity in the BAR's value. It argued below that, despite this knowledge, it had a "professional privilege" to "*remain silent*" about this fact.[24] This is an admission of guilty knowledge, however one defines that standard. The Court of Appeals properly ruled here that First Boston could not remain silent when it knew that the BAR was grossly overvalued in the registration statement that First Boston endorsed.

First Boston also claims that it was improperly condemned for its "failure to forecast a sale of the stock of BAR for $5 million" (Pet. at 10). That, again, misses the point. First Boston *knew* that the BAR was not worth $18 million and it also *knew* that serious negotiations for a sale were under way—negotiations which were finalized shortly after Bangor Punta obtained control. That, without more, made it guilty when it accepted a fee and added its name to a prospectus that represented that the BAR had a "market price evaluation" of $18 million without referring to the pending negotiations to sell the railroad for between $5 and $7 million. First Boston's silence with knowledge of the true facts is a gross violation of the anti-fraud provisions of the securities laws—as shown by the fact that each member of the panel found First Boston

24. The quotations are from briefs filed by First Boston in the District Court (emphasis added).

liable and the full bench refused an *en banc* rehearing of the very arguments now repeated by First Boston.[25]

First Boston contends that businessmen, particularly in the securities industry, need guidance on the issue of *scienter* under Section 14(e)[26] (First Boston Pet. at 20). But in 1973 the business community needs scarcely be told that if it knowingly omits material facts or violates anti-manipulation rules, it can be held liable. Moreover, since 14(e) incorporates the basic principles of Rule 10b-5, there is a massive body of law and literature on the subject of *scienter*. *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*.

For their part, the Piper petitioners twist the wording of the Second Circuit's decision when they claim that *scienter* was found because of their failure to be "meticulous and precise" (Piper Pet. at 20). In fact, what the Second Circuit said was:

> "The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing [citations omitted]. By reason of the special relationship between them, shareholders are likely to rely heavily upon the representations of corporate insiders when sharehold-

25. On rehearing, the Court did grant First Boston's requests to the extent of ordering the District Court, on remand, to determine whether the existing record supported liability against two of First Boston's officers who were also defendants (Jt. App. 1-2).

26. First Boston cites *H. Kook & Co.* v. *Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93 (2d Cir. 1969), for the proposition that guidance to the securities industry is desirable. This citation is particularly inappropriate since it involved a party who was held not liable because it followed an SEC ruling. Had petitioner similarly obeyed the SEC's warnings on Rule 10b-6—as Chris-Craft did—the outcome of this entire control contest would have been reversed.

ers find themselves in the midst of a battle for control. Corporate insiders therefore have a special responsibility to be meticulous and precise in their representations to shareholders. The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading." (Jt. App. II-38)

In conclusion, the undisputed record establishes *scienter* under the most rigorous standards applied by any circuit court. If the conduct in this case does not subject petitioners to liability, then the right of action which this Court has consistently given to victims of securities frauds would be a hollow one.

Causation

In their attempt to persuade this Court to grant certiorari, petitioners also argue that the decision below established new principles of causation. In fact, the existence of causation was a matter of simple arithmetic and went beyond what is required by the standards established in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). In *Mills*, the merger in question was approved by a wide margin; in *Ute*, defendants made no representations to the vast majority of the plaintiffs. Here, the mathematics of causation are:

1. Bangor Punta acquired 7½% of Piper's stock for cash in an admitted violation of Rule 10b-6 (Jt. App. II-65).

2. Bangor Punta obtained an additional 7% of Piper's stock in its exchange offer by means of an admittedly misleading prospectus.

3. Without either the 7½% block purchases for cash or the 7% of Piper's stock obtained on the exchange offer, Bangor Punta would have failed in its quest for control.[27] It needed both blocks to succeed.

4. Had Bangor Punta not illegally acquired 14½% of Piper's stock, at the end of the exchange offers, Chris-Craft would have had 41% of Piper's stock to 31% for Bangor Punta, and could not have been overtaken in the race for control.

Thus, this is a case in which acquisition of shares in violation of the securities laws actually reversed the outcome of the contest and gave Bangor Punta control of Piper. No matter what standard of causation is applied, it was met here.

Petitioners would ignore this Court's decisions in *Mills* and *Ute* and require Chris-Craft to establish not only that Bangor Punta won *because* it violated the law but also that, in a hypothetical contest in which they did not violate the law, Chris-Craft would have prevailed. But *Mills* and *Ute* rejected this type of defense by a wrongdoer who wants to speculate how thousands of shareholders would have reacted to a situation which never existed. See, *e.g.*, *Mills*, *supra*, 396 U.S. at 382 n.5. Therefore, the Court established an "objective test" that proof of the materiality of a misstatement embodies a determination that there is a causal

27. In addition, the Court of Appeals found petitioners gained a further unfair advantage by obstructing Chris-Craft's initial cash tender offer and subsequent exchange offer by various false and misleading statements (H-61 to H-62). As noted above, both the District Court and Court of Appeals *en banc* noted that the Grumman transaction had an adverse impact on Chris-Craft's cash tender offer.

relationship between violation and injury. *Mills, supra*, 396 U.S. at 384-85. And again in *Ute*, the Court reiterated:

> "Under the circumstances of this case involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. *All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision* [citations omitted]. *This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. Chasins* v. *Smith, Barney & Co.*, 438 F.2d at 1172." 406 U.S. at 153-54 (emphasis added).

Mills and *Ute* do not stand alone. It is obvious that a party who wins a race by illegal tactics cannot prevail by saying his victim must prove he would have won in a fair contest. Hence, *Mills* and *Ute* have been followed in subsequent cases, *Kohn* v. *American Metal Climax Inc.*, *supra*, and *Sonesta Int'l Hotels Corp.* v. *Wellington Associates*, CCH Fed. Sec. L. Rep. ¶94,041 (2d Cir. July 3, 1973).

Piper argues, without logic, that the *Mills-Ute* standard should not apply where misrepresentations were made to third parties who had to choose between Chris-Craft's and Bangor Punta's offers. But, as the Court below recognized, this is an *a fortiori* situation for the application of the *Mills-Ute* standard:

> "The fact that CCI [Chris-Craft] was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential. It would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require CCI to

> prove that each individual Piper shareholder who failed to trade for CCI's stock, or who traded for BPC's [Bangor Punta] stock, relied upon defendants' misrepresentations in doing so." (Jt. App. H-59)

To deny a victim of securities violations damages unless it can prove as a fact what would have happened had the contest not been affected by petitioners' violations would create a burden of proof which would, in effect, immunize securities violators from liability. The teaching of *Mills*, where the contest was not even close, is that any doubts about causation must be resolved "in favor of those whom the statute is designed to protect." 396 U.S. at 385.

Nor is the *Mills-Ute* principle novel or unusual, as petitioners suggest. This theory of causation was applied where third parties were misled to plaintiff's detriment in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970). Indeed, it was recognized over 25 years ago in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), a private action to enforce the antitrust laws—which this Court stated in *Borak* serve the same statutory objectives as private suits to enforce the securities laws. 377 U.S. at 432. In *Bigelow*, the defendants claimed immunity from damages on the ground that the plaintiff had not established that it would have been better off under the conditions that might have prevailed in a market place not affected by defendants' antitrust violations. In rejecting that contention, this Court declared:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so

effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See *Package Closure Corp.* v. *Sealright Co.*, 141 F.2d 972, 979. That principle is an ancient one, *Armory* v. *Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suits * * *." 327 U.S. at 264-65.[28]

Here, petitioners seek to reverse this "ancient" principle by requiring Chris-Craft to show that it definitely would have prevailed in a contest in which petitioners complied with the law.[29]

First Boston accepts the fact—as it must—that the *Mills* and *Ute* rule of causation applies in control contests such as the instant case. But it argues that the rule only applies to the period when there were competing exchange offers outstanding; that at the end of that period neither side had control, with the score 45% to 41% in favor of

28. See *Union Pac. R.R.* v. *Chicago & N.W. Ry.*, 226 F. Supp. 400 (N.D. Ill. 1964), a case strikingly similar to the instant case, which was cited with apparent approval by this Court in *Mills* (396 U.S. at 385); see also *Laurenzano* v. *Einbender*, 264 F. Supp. 356, 361-62 (E.D.N.Y. 1966); and *Globus, Inc.* v. *Jaroff*, 271 F. Supp. 378, 381 (S.D.N.Y. 1967), both cited in *Mills* (396 U.S. at 385n.7).

29. In fact, the evidence did show that the blocks which Bangor Punta acquired for cash were favorably disposed toward Chris-Craft. The petitioners' proxy solicitor "kept wringing his hands because he believed these shares were leaning toward Chris-Craft" (1826A-1827A). Bangor Punta's own president testified that he believed that these shares were "emotionally committed to Chris-Craft" (1836A). While Chris-Craft refrained from buying the shares because of Rule 10b-6, Bangor Punta preempted them with its illegal cash purchases.

Bangor Punta; and that Bangor Punta later obtained control by open market purchases of 6% of Piper's stock. First Boston contends: "This determined the contest, not any unlawful activities of defendants" (Pet. at 34). But Bangor Punta obtained more than 14% by those unlawful acts. What is the logic of disregarding those 14% illegal blocks and saying that control was acquired by a subsequently acquired 6% block?

First Boston also speculates that *Mills* and *Ute* should not control "if one assumes that Bangor Punta had stopped short of buying control after the exchange offer or *had bought enough additional shares for cash so the shares acquired on the exchange offer were not needed to assure control*" (Pet. at 34) (emphasis added). But that did not happen. It is an undeniable fact that had Bangor Punta not acquired the two 7% blocks, Chris-Craft would have led by a margin of 41% to 31% at the end of the exchange offers. With that commanding lead, majority control would have been Chris-Craft's for the asking.

Therefore, underlying all of petitioners' causation arguments is the cynical and untenable premise that Chris-Craft could have overcome the advantage that petitioners gained through illegal acquisitions by bidding up to the sky for the remaining shares. Under this theory, the more serious the illegal advantage, the more petitioners would have the victim spend. Orwell could not do better.

The fundamental fact is that Chris-Craft was entitled to a fair opportunity to compete for control. It was denied that opportunity. Petitioners cannot now escape liability for their acts by engaging in idle speculation that perhaps

they would have won a fair contest anyway, or that Chris-Craft might have overcome their illegal advantage if it had unlimited resources. *Mills* and *Ute* were adopted to cut off such conjecture. As the Court of Appeals stated in this case:

> "What the securities law violations caused was a denial to CCI of a fair opportunity to compete for control of Piper. The specific injury sustained was a reduction in the value of CCI's Piper holdings upon BPC's unfairly obtaining control. CCI spent large sums of money in actively seeking control. Its purchases were made in the reasonable belief that its opponents would battle hard but within the law. CCI is entitled to compensatory damages for the decline in the value of the minority shareholder's interest with which it became encumbered as a result of competing against those who violated the securities laws." (Jt. App. H-60)

Having won by violating the law, petitioners cannot now speculate that they would have won anyway.

POINT III

THE COURT OF APPEALS DECIDED ISSUES OF LAW, NOT FACT.

The Piper insiders and First Boston (but not Bangor Punta) contend that certiorari is warranted because the Court of Appeals violated the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) by disregarding the trial court's findings (Piper Pet. at 21-23; First Boston Pet. at 35-38). This is a make-weight argument.

This case was tried largely on the basis of over 500 stipulated facts, hammered out in months of pre-trial pro-

ceedings.[30] At the close of the trial, the District Court specifically thanked counsel for the "painstaking effort" of agreement on facts, a degree of cooperation "that I do not recall in some 40 years of practice at the bar myself." As a result of this process, the actual trial took only nine days instead of several weeks (2228A-2229A).

The District Court's opinion was, therefore, largely a matter of applying to these essentially undisputed facts its own theory of causation and its philosophy that large, sophisticated companies were less entitled to the protection of the securities laws than other litigants (Jt. App. G-3).

In the Court of Appeals the dispute was entirely on legal grounds. The SEC filed an amicus brief in support of Chris-Craft's appeal because "[i]t disagrees with certain of the legal principles expressed by the district court and with the application by the district court of those principles to underlying facts that are not essentially in dispute." And Judge Timbers in the majority opinion stated:

> "Our disagreement with the district court on whether defendants have violated §14(e) does not go to its findings of fact as to which the 'unless clearly erroneous' test applies, but to its application of the legal standards just discussed." (Jt. App. H-37)

There was no violation of the clearly erroneous rule here, just as this Court did not violate that standard in *Ute* where it overturned the District Court's mistaken standard of causation. The District Court stayed within its permissible scope of review. *United States* v. *General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966).

30. The Joint Appendix in the Court of Appeals is over 2300 pages long, not counting two volumes of exhibits.

It is particularly ironic that First Boston should complain that the Court of Appeals unanimously disregarded the clearly erroneous standard as to it. First Boston did not call a single witness at trial, and its liability was based on the stipulated fact that it had examined the Bangor Punta minutes showing that the Board was prepared to sell the railroad for $7 million (496A, 515A, 517A, 518A, 556A). Wtih this knowledge, First Boston, for a commission, endorsed and distributed a prospectus that represented a value of the railroad as $18 million. It offered, and could offer, no excuses for such conduct.

The Piper insiders' assertions about the clearly erroneous rule are equally specious. For example, they complain about the appellate interpretation of their misleading press releases. It is hard to see how these releases could have any meaning other than that ascribed to them by the Second Circuit. In any event, the appellate decision did not impinge on the jurisdiction of the District Court since it is well established that appellate courts are free to examine written documents and to determine their legal significance. See, *e.g.*, *Serveri* v. *Seneca Coal & Iron Corp.*, 381 F.2d 482 (2d Cir. 1967); *Nasco Inc.* v. *Vision-Wrap, Inc.*, 352 F.2d 905 (7th Cir. 1965); *United States* v. *John McShain Inc.*, 258 F.2d 422 (D.C. Cir.), *cert. denied*, 358 U.S. 832 (1958).

In sum, the Second Circuit abided by the clearly erroneous test, and reversed the District Court on issues of law, not fact. This case presents no issue under the clearly erroneous test; there is no conflict between the circuits; and there is no need for Supreme Court clarification of this traditional standard.

Conclusion

Over four years have passed since Bangor Punta seized control of Piper by illegal acts. The damage to Chris-Craft, which invested $44 million in Piper, continues every day. Yet, although more than three years ago the Second Circuit in an *en banc* decision first directed the District Court to determine an appropriate remedy for Chris-Craft, the day of final judgment is still not in sight. At the very least a hearing on relief must still be held.

In this case in which Chris-Craft's investment in Piper is under the control of Bangor Punta, and at risk, a remedy delayed is a remedy denied. The time has come for Chris-Craft to be compensated for the grievous injury inflicted by petitioners' repeated violation of the laws. There is no genuine issue worthy of review presented by the Second Circuit's careful decision. The only thing unique about this case is the extent of the violations of law. The petitions for certiorari should be denied.

Respectfully submitted,

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